NO. 92-1295

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1992

KIRK FORDICE, ET AL.,
APPELLANTS

V.

HOLLIS WATKINS, ET AL.,
APPELLEES

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF MISSISSIPPI

MOTION TO DISMISS OR AFFIRM

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THE QUESTIONS PRESENTED FOR REVIEW

1. Whether this Court lacks jurisdiction over appellants' direct appeal of an order only awarding attorney fees entered by a three-judge district court ancillary to resolution of the case on the merits?

2. Whether this Court should decided a question that was not raised, litigated, or resolved in the lower court?

3. Whether this Court should grant a petition for writ of certiorari to the Court of Appeals prior to judgment on an issue that is not of imperative public importance concerning the reasonableness of the amount of attorneys' fees awarded by a district court?

4. Should this Court summarily affirm the district court's finding that appellees were prevailing parties when that finding is not clearly erroneous?

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No. 92-125

In The

SUPREME COURT of the UNITED STATES

October Term, 1992

KIRK FORDICE, ET AL.,

APPELLANTS

V.

HOLLIS WATKINS, ET AL.,

APPELLEES

On Appeal from the United States District Court
For the Southern District of Mississippi

MOTION OF APPELLEES TO DISMISS OR AFFIRM

Appelees, pursuant to **SUP CT. R. 18.6,** move to dismiss this appeal, or alternatively, to affirm the district court's holding that appellees were prevailing parties on the grounds that: (1) this Court lacks jurisdiction over appellants' direct appeal; (2) the appeal presents an issue that was not presented nor considered by the court below; (3) the questions presented on appeal are so insubstantial as not to need further argument; and (4) the district court's finding that appellees were prevailing parties was not clearly erroneous.

STATEMENT OF THE CASE

Appellant, the Standing Joint Legislative Committee on Reapportionment of the Mississippi Legislature (hereinafter referred to as "the Joint Committee"), began the process of reapportioning the Mississippi Legislature in November, 1990 when it held public hearings on reapportionment criteria in Greenville, Mississippi. (R. 2705, 2709, 2710).[1] Appellees, and their attorneys, in Greenville and throughout the process, urged the Joint Committee and the Legislature to adopt, as criteria, (1) equality of population among districts, (2) non-dilution of black voting strength, and (3) creation of the maximum number of electable black majority districts.[2] (R. 2702-2703, 2709, 3266-3292). The Joint Committee adopted but did not follow the suggested criteria in drawing reapportionment plans. (R. 26-29, 2305-2307). Appellees opposed the plans adopted by the Legislature in 1991 because those plans did not create black majority districts wherever possible as did alternate plans presented by appellees. (R. 3267-3289). Opposition by the appellees included submitting a comprehensive written comment, with exhibits, to the United States Attorney General on June 11, 1991 urging the Attorney General to interpose a timely objection to the submitted plans and meeting with Assistant Attorney General John Dunne to voice opposition to the plans. (R. 3293-3355, 2655, 2728). Much of the information provided the Attorney General by appellees formed the basis of the Attorney General's objection to the plans on July 2, 1991. (R. 3293-3355, 26-29).

Partisan primary elections were scheduled for September, 1991, with a candidate qualification deadline of July 19, 1991. (R. 10). The United States Attorney General had not made a determination on appellants'

[1]"R" denotes reference to the record in the trial court followed by the page number.

[2]Appellees defined "electable black majority districts" as those districts containing a black voting age population of 60% throughout most of the State and 65% in the Mississippi Delta. (R. 3299A, n. 8).

submitted plans by June 28, 1991, thus appellees filed suit. (R. 1-29). Appellees asserted four (4) distinct yet interrelated claims: (1) that the present legislative apportionment scheme was unconstitutionally malapportioned; (2) the submitted apportionment scheme was unenforcable because it had not been precleared; (3) the existing apportionment scheme impermissibly diluted black voting strength; and (4) the existing scheme had been gerrymandered for a racially discriminatory purpose. (R. 10-12). As relief, appellees sought: (1) declaratory and injunctive relief against use of the existing malapportioned "or any unprecleared" scheme: (2) "rescheduling" of the candidate qualification deadline and a "court ordered or court approved interim apportionment plan for election districts for the Mississippi State Senate and the Mississippi House of Representatives to be used for the elections scheduled for September 17, 1991 and November 5, 1991" with the persons so elected to hold office "for four years or a shorter time;" (3) an order requiring the appellants "to present legislatively enacted and precleared final reapportionment plans for the Legislature to be used in all legislative elections after preclearance was obtained;" and (4) convening of a three-judge district court to decide the constitutionality of the state legislative apportionment scheme and issues raised by appellees under Section 5 of the Voting Rights Act of 1965. (R. 12-15).

After much litigation and negotiation, the parties settled their differences when the Legislature enacted and obtained preclearance of an apportionment scheme that had been drafted primarily by appellees.[3] (R. 2672-

[3]In support of their motion for an award of attorney fees, appellees' counsel filed declarations, with exhibits attached, which stated that they had negotiated "a settlement." (R. 2630, 2633, 2672-2682, 2722A). As one exhibit clearly shows, "Republican Sen. Roger Wicker of Tupelo, the chairman of the Senate Elections Committee, revealed that at the behest of Lt. Gov. Eddie Briggs, he had met with the attorney for the black [appellees] and essentially let him write his own ticket on how black majority districts would be constructed." (R. 2722A). The evidence further showed that, "Wicker openly admitted the deal was cut to get a commitment from the black [appellees] that the reapportionment plan would not be contested in court." (R. 2822A).

2682, 2722A).

Once the parties reached an accord on the plans, the district court, pursuant to earlier motions and arguments of counsel,[4] scheduled elections under the precleared plans. Appellees timely filed their attorney fees motion setting forth facts which proved the goal of their lawsuit had been achieved through settlement. (R. 2603-2833). Appellants did not file any evidence disputing appellees contentions. More importantly, appellants did not raise a question or file any evidence supporting their assertions being advanced for the first time on this appeal that they negotiated a settlement with appellees and devised, with appellees assistance, the 1992 apportionment plans to satisfy the "subjective concerns" of the United States Attorney General.[5]

Appellees sought $805,659.10 in fees and $61,279.29 in expenses.

[4]Appellants erroneously assert that the district court "sua sponte" scheduled legislative elections in 1992. Juris. Stat. at 11. However, the district court "considered the arguments of counsel at the status conferences, together with the motions and supporting memoranda submitted since [the court's] August, 1991 opinion and orders" in scheduling elections. **Watkins v. Fordice,** 791 F. Supp. 646, 648 (S.D. Miss. 1992) (three-judge court). Although appellees filed their motion to schedule elections prior to appellants on April 28, 1992, (R. 2291-2302, 2385-2488), appellees unconditionally withdrew their motion on June 12, 1992. (R. 2598-2602).

[5]Appellants argued below that the 1992 apportionment scheme addressed the Attorney General's July 2, 1991 objection letter. The Attorney General's letter provided:

> Under these circumstances, we cannot conclude, as we must under the Act, that the State has sustained its burden of showing that the proposed House and Senate redistricting plans are free of any racially discriminatory purpose. Accordingly, I must, on behalf of the Attorney General, interpose an objection to the proposed redistricting plans for the Mississippi House of Representatives and the Mississippi Senate. (R. 28).

ARGUMENT

I. THE COURT SHOULD DISMISS APPELLANTS' APPEAL

A. On ground that this Court lacks jurisdiction of appellants' direct appeal under 28 U.S.C. Sections 1253, 2101, and 2284, and 42 U.S.C. Section 1973c because the appeal is not one from an order granting or denying a preliminary or permanent injunction or holding an Act of Congress unconstitutional or a legislative reapportionment plan violative of the provisions of Section 5 of the Voting Rights Act of 1965.

This court does not have appellate jurisdiction under 28 U.S.C. Section 1253 to consider a direct appeal from an order entered by a three-judge district court, convened pursuant to 28 U.S.C. Section 2284, which only awards attorney fees. **Supreme Court of Virginia v. Consumers Union,** 446 U.S. 719, 737, n. 16 (1980); **Mitchell v. Donovan,** 398 U.S. 427, 430 (1970); **Hicks v. Pleasure House,** 404 U.S. 1 (1971) (per curiam). Nor does this Court have appellate jurisdiction under 42 U.S. C. Section 1973c to consider a direct appeal involving only an attorney fees order entered by a three-judge district court where Section 5 issues are not involved. See, **42 U.S.C. Section 1973c** ("Any action under this section shall be heard and determined by a court of three judges in accordance with the provisions of section 2284 of title 28 of the United States Code and any appeal shall lie to the Supreme Court"). "Action under this section" means one seeking to enforce the preclearance provisions of Section 5 of the Voting Rights Act of 1965. See, **Allen v. State Board of Elections,** 393 U. S. 544 (1969). The instant appeal is not one involving the preclearance provisions of Section 5 of the Voting Rights Act. Therefore, this Court's appellate jurisdiction under 42 U.S.C. Section 1973c cannot be invoked.

Appellants below did not challenge the constitutionality of 42 U.S.C. Section 1973l(e) or 1988.

Consequently, this Court's appellate jurisdiction under **28 U.S.C. Section 2101(a)** cannot be invoked. And, appellants direct appeal to this Court from an attorney fees order is not "authorized by law." See, **Supreme Court of Virginia v. Consumers Union,** supra. Therefore, this Court's appellate jurisdiction under **28 U.S.C. Section 2101(b)** is not invoked.

B. On grounds that the issue of whether appellants enacted the settlement reapportionment plans "to satisfy the subjective concerns of the Attorney General of the United States under Sections 5 and 2 of the Voting Rights Act" was not presented in nor considered by the court below and is not of such imperative public importance as to justify deviation from normal appellate practice and to require immediate settlement in this Court.

Appellants did not present evidence or argument in the court below that the case was settled to satisfy any alleged subjective concerns of the United States Attorney General. "Ordinarily, this Court does not decide questions not raised or resolved in the lower court." **Youakim v. Miller,** 425 U.S. 231, 234 (1976). The Court traditionally has declined to address such questions even if presented in a petition for writ of certiorari. **Patrick v. Burget,** 486 U.S. 94, 99 n. 5, rehearing den. 487 U.S. 1243 (1988). "It is only in exceptional cases...that questions not pressed or passed upon below are reviewed." **Youakim v. Miller,** supra, at 234. The instant issue raised by appellants is not an exceptional issue requiring deviation from normal appellate practice. The record is void of any evidence which could support the issue. Although appellants perfected a timely appeal to the United States Court of Appeals for the Fifth Circuit, they have not presented the issue to the Fifth Circuit prior to raising it in this Court. No conflict exists in the courts of appeal concerning the issue. Nor has any court of appeals decided the question in a way which

conflicts with precedent in this Court. See **SUP. CT. R. 10.** Normally certiorari jurisdiction is invoked "to resolve conflicts among the Circuit Courts of Appeals and state courts concerning the meaning of provisions of federal law." **Braxton v. United States,** ____U.S.____, 111 S. Ct. 1854, 1857 (1991). No exception exists necessitating this Court to deviate from normal appellate practice and resolve the issue not raised below.

Additionally, the record evidence does not reflect any "subjective concerns" of the Attorney General. To the contrary, the Attorney General's July 2, 1991 objection letter was based on the appellants' failure to prove the 1991 apportionment plans were absent a racially discriminatory purpose. The Attorney General's objection was not based on "subjective concerns" but rather the requirements of Section 5 of the Voting Rights Act. See, **Georgia v. United States,** 411 U.S. 526 (1973). Consequently, this Court should dismiss appellants' appeal.

C. On grounds that the issue of reasonableness of the attorneys' fee award does not involve a conflict in the Circuit Courts of Appeals or with state courts of last resort and is not of such imperative public importance as to justify deviation from normal appellate practice and to require immediate settlement in this Court.

Certiorari is usually granted where principles important to the public, as distinguished from the parties, are involved and where a real conflict of opinion and authority exists in the Courts of Appeals. **NLRB v. Pittsburg S.S. Co.,** 340 U.S. 498 (1951). Appellants have not raised, nor can they, any issue important to the public as distinguished from the parties or any conflict in the Circuit Courts of Appeals in the instant appeal. As such, the appeal should be dismissed and the petition for certiorari prior to judgment in the Court of Appeals should be denied.

II. IN THE ALTERNATIVE, THIS COURT SHOULD SUMMARILY AFFIRM THAT PART OF THE DISTRICT COURT'S ORDER HOLDING THAT APPELLEES WERE PREVAILING PARTIES

In the alternative, if this Court determines that it has jurisdiction over this appeal, then appellees submit that the Court should summarily affirm that part of the district court's order which held that appellees were prevailing parties entitled to an award of attorney fees.[6] Appellees presented evidence substantiating their claim that they prevailed on several significant issues in litigation and achieved exceptional results through settlement. Appellants, with insubstantial proof, opposed appellees' "motion for attorneys' fees and expenses contending that [appellees were] not prevailing parties within the meaning of the applicable attorneys' fee statutes." Juris. Stat. at A6. The district court ruled, "[n]evertheless, and though it is in the court's opinion a close question, the court will conclude that [appellees], and this lawsuit, played a motivating role in shaping the particular apportionment plans which the legislature adopted." Juris. Stat. at A12. As such, the court determined that appellees were prevailing parties entitled to an award of attorneys' fees. Juris. Stat. at A12. "[T]o qualify as a prevailing party, a civil rights plaintiff must obtain at least some relief on the merits of his claim." **Farrar v. Hobby,** ____U.S.____, 113 S. Ct. 566, 573 (1992). The relief may be obtained through a "settlement." **Id.,** at 573. A party has prevailed when he can "point to a resolution of the dispute which changes the legal relationship between" the parties. **Texas Teachers v. Garland School Dist.,** 489 U.S. 782, 792

[6]Appellees request for affirmance of the prevailing parties determination is not inconsistent with their argument in **Watkins v. Fordice,** Sup. Ct. No. 92-1257 (appeal pending), that the three-judge district court did not have jurisdiction to determine the attorney fees issues. The three-judge district court's determination of the prevailing parties issue was harmless error. Only the managing district judge should have decided that issue. Since he, as part of the three-judge court, made the determination, his ruling on this issue can be affirmed.

(1989). A civil rights plaintiff can prevail, for attorney fees purposes, "without formally obtaining relief." **Hanrahan v. Hampton,** 466 U.S. 754, 757, rehearing den. 448 U.S. 913 (1980) (per curiam). "The fact that [appellees] prevailed through a settlement rather than through litigation does not weaken [their] claim to fees." **Maher v. Gagne,** 448 U. S. 122, 129 (1980). There is no requirement that a party obtain a "judicial determination that the [party's] rights have been violated" in order to be declared a prevailing party. **Id.,** at 129.

Obviously, the district court correctly applied these principles in determining that appellees were prevailing parties "entitled to an award of attorneys' fees and expenses..." Juris. Stat. at A12. Where, as here, the district court's determination on the prevailing party question is "based on its familiarity with the progress of the litigation through the pleadings, discovery, and settlement negotiation stages" it should not be disturbed on appeal. **Id.,** at 130, citing **Graver Tank & Mfg. Co. v. Linde Air Products Co.,** 336 U.S. 271, 275 (1949). This Court, in **Graver Tank & Mfg. Co.,** held that appellate courts should "make allowance for the advantages possessed by the trial court in appraising the significance of conflicting testimony and reverse only 'clearly erroneous' findings." **Graver Tank & Mfg. Co. v. Linde Air Products Co.,** supra at 275. As this Court has held, "[w]here there are two permissible views of the evidence, the fact-finder's choice between them cannot be clearly erroneous." **Anderson v. City of Bessemer City, N. C.,** 470 U.S. 564, 574 (1985). Or, stated differently, "[i]f the district court's account of the evidence is plausible in light of the record viewed in its entirety, the court of appeals may not reverse it even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently." **Id.,** at 573-574. There was abundant evidence in the record supporting the district court's finding that appellees were prevailing parties. That finding is not clearly erroneous and should not be disturbed here. Thus, this Court should summarily affirm the district court's finding that appellees were prevailing parties.

CONCLUSION

On the basis of the foregoing, this Court should dismiss appellants' appeal and deny their petition for writ of certiorari to the United States Court of Appeals for the Fifth Circuit prior to judgment, or, alternatively, this Court should summarily affirm the district court's finding that appellees were prevailing parties.

DATED: February 25, 1993.

Respectfully submitted,
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